IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-4

NORTHERN INDIANA PUBLIC SERVICE COMPANY,

Petitioner,

v.

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE, et al., THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, and THE CITY OF GARY, INDIANA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS PEOPLE OF THE STATE OF ILLINOIS IN OPPOSITION TO THE PETITION AND IN RESPONSE TO THE GOVERNMENT'S MEMORANDUM

WILLIAM J. SCOTT,
Attorney General of Illinois,
RICHARD W. COSBY,
MARVIN N. BENN,
Assistant Attorneys General,
Environmental Control Division,
188 West Randolph, Suite 2315,
Chicago, Illinois 60601,
312/793-2491

Attorneys for Respondents.

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Respondents respectfully submit that the Petition for a Writ of Certiorari filed by Northern Indiana Public Service Company ("NIPSCO") should be denied.[1]

OPINIONS BELOW

The Petition for Writ of Certiorari correctly sets forth the relevant proceedings and opinions below except insofar as it fails to point out that on October 16, 1974, the court below stopped all construction at the Bailly site by staying all site dewatering.[2]

JURISDICTION

The Petition correctly states that jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

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1. This Brief in Opposition is filed on behalf of the People of the State of Illinois, ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, identified as "Petitioners-Intervenors" in the court below, and are Respondents in this Court, and also responds to the Government's Memorandum received on September 2, 1975.

2. The opinion below, *Porter County Chapter of the Izaak Walton League, et al.* vs. *A.E.C., et al.*, is reported in 515 F. 2d 513 (7th Cir. 1975).

QUESTIONS PRESENTED

The major question presented is whether the court below properly concluded that the Atomic Energy Commission ("AEC")[3] did not properly apply its own regulations to the facts of this case.

The NRC recently published a supervening "interpretative amendment"[4] to the regulation upon which NIPSCO states the decision below turned.

NIPSCO claims that the amendment is controlling (Pet. p. 23).[5] The State of Illinois contends that this amendment raises issues not presently before this Court.[6]

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3. The AEC has been succeeded by the Nuclear Regulatory Commission ("NRC"). Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233-1254.

4. 40 Fed. Reg. 26526-7, June 24, 1975.

5. NIPSCO's Petition for Writ of Certiorari will be referred to as "Pet."; NIPSCO's Appendix as "Pet. App."; the Federal Government's and NRC's "Memorandum for the United States and the Nuclear Regulatory Commission" will be referred to as "Memorandum" and the NRC and the Government will be referred to jointly where appropriate as the "Government".

6. If Certiorari is granted, Illinois hereby reserves the right to argue that the AEC, by issuing a construction permit to NIPSCO, unlawfully transgressed on the jurisdiction of the Department of the Interior. An argument presented to but not reached by the court below.

STATEMENT OF CASE

The Bailly nuclear facility is located within 300 feet of an ecologically sensitive and unique national park area. In 1966, the Secretary of the Interior was authorized to establish the Indiana Dunes National Lakeshore in order to "preserve for the educational, inspirational, and recreational use of the public certain portions of the Indiana Dunes and other areas of scenic, scientific, and historic interest and recreational value. . . ." 16 U.S.C. § 460 u.

The National Lakeshore has thus far acquired 8,300 acres of land, most of which is open dune and wetland. The Licensing Board found and concluded:

> The Indiana Dunes region includes an exceptional combination of sand dunes, marshes, swamps and bogs, white sand beaches, and diversified flora and fauna — a natural area difficult to equal anywhere in the nation. That portion of the Indiana Dunes National Lakeshore adjacent to the Bailly site . . . is one of the best remaining areas in the Indiana Dunes . . . [I]t contains a cross section including a wide beach of largely quartz sand, a low foredune covered by sparse vegetation — higher dunes, some active and sparsely covered and others having trees and other vegetation rising from 25 to almost 200 feet above Lake Level in a complex of blowouts, ridges, valleys and interdunal ponds . . . The dynamic nature of the Indiana Dunes has attracted scientists as an ideal outdoor laboratory to study the principles of ecological succession . . . .
>
> On the south of the dune complex . . . is a unique wetland area known as Cowles Bog which contains an undrained pond or depression filled with water and largely covered by a relatively thick mat of vegetation . . . [T]he Department of Interior's National Park Service has designated a sizeable portion of these unique natural settings abutting the proposed plant site as a Class IV land, namely "an outstanding natural area of special significance for public edification" . . . (Pet. App. pp. 87-88).[7]

The Bailly site is bordered on the west and south by Bethlehem Steel Corporation employing some 7,500 employees (Pet. App. p. 8; 515 F. 2d 518). To the south and west of the site are 5 major cities, Gary, Hammond, East Chicago, Whiting and Chicago and numerous municipalities intermeshed within which almost 7 million people live. (Pet. App. pp. 8-9; 515 F. 2d 518).

The Bailly site is within 20 miles of the Illinois State line and the corporate limits of the City of Chicago. "The downtown Chicago loop area is about 30 miles from the site. Downtown Gary is about 12 miles and the eastern boundary of Gary is 5.25 miles from the proposed reactor building" (Pet. App. p. 9; 515 F. 2d 518).

Because of the proximity of the National Lakeshore to the Chicago metropolitan area, the National Lakeshore facilities are used and enjoyed by a large number of citizens of the State of Illinois. Not only is the prospect of irreversible environmental damage to the National Lakeshore a matter of concern to the People of the State of Illinois, but the State of Illinois is vitally concerned with the safety and health of its citizens.

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7. The court below (Pet. App. p. 25 n. 24; 515 F. 2d 526 n. 24), noted that the poet Carl Sandburg is reported to have said:

> The Indiana Dunes are to the Midwest what Yosemite is to California, Grand Canyon is to Arizona. They are a signature of time and eternity. Once lost, their loss would be irrevocable.

Chicago Sun Times, December 8, 1974 (Magazine), at 15.

During the course of the hearings before the Atomic Safety and Licensing Board,[8] testimony was presented which established that the Bailly plant would have the following adverse impacts on the National Lakeshore (Pet. App. pp. 26-27; 515 F. 2d 526-27):

1. In the event of an accidental release of radioactive waste, the park would be evacuated and public use and enjoyment suspended.
2. The plant's natural draft cooling tower would have an adverse visual impact on the natural beauty of the Lakeshore.
3. Other adverse effects included:
   a. acid formation due to mixing of the cooling tower plume with the smoke stack plume from applicant's fossil fuel units 7 and 8;
   b. lowering the groundwater table during construction would lower the water level of bogs and ponds in the National Lakeshore, permanently damaging the delicate ecological system in those unique wetlands;
   c. operations of the nuclear facility would pollute Lake Michigan with undesirable waste material;

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8. Hereinafter sometimes referred to as "ASLB"; the Atomic Safety and Licensing Appeal Board sometimes referred to herein as "ASLAB".

9. The cooling tower will be 400-450 feet tall and 440 feet in diameter. The ASLB, in their findings (No. 131) found the proposed natural draft cooling tower constituted a man-made, visual intrusion having an adverse environmental impact (Pet. App. p. 27; 515 F. 2d 527).

   d. use of such ponds now on the Bailly property in conjunction with the new facility would pollute the National Lakeshore into which they drain; and
   e. intake of additional cooling water for the nuclear facility would destroy substantial quantities of fish in Lake Michigan.
4. The National Lakeshore provides scarce and vitally needed recreational opportunities and open space to the residents of the densely populated areas around the southern shore of Lake Michigan.
5. The Federal Government spent millions of dollars acquiring the National Lakeshore and developing it to its present state and plans to spend millions more in the future; and
6. There is no substitute for the Lakeshore's Class IV natural area and Cowles Bog. However, the proposed nuclear power plant could be built elsewhere.

Despite this testimony, the AEC rendered a decision authorizing the issuance of a construction permit to NIPSCO.

The Court below stated that there were many persuasive reasons for requiring the AEC to comply with its own regulations (Pet. App. pp. 33-34; 515 F. 2d 530), among them:

1. The fact that the AEC appeared to have given no consideration to "the clustering of nuclear power plants around the southern end of Lake Michigan within relatively short distances from the density of population of metropolitan Chicago" (Pet. App. pp. 18, 22; 515 F. 2d 523, 525). Presently there are eight nuclear power plants within about 75 miles of Chicago and six more in the planning stage (Pet. App. p. 19;

515 F. 2d 523). The AEC gave no consideration of the effect of the production of the potentially explosive plutonium by-product by the clustered plants on the Chicago metropolitan population (Pet. App. p. 22; 515 F. 2d 523-24):

a. the AEC's own regulations require that "where very large cities are involved, a greater distance may be necessary because of total integrated population dose consideration" 10 CFR § 100.11(a)(3); and

b. the AEC's own staff stated that it was a long-standing policy of the Agency to discourage the siting of nuclear plants near densely populated areas until additional operating experience has been obtained. (Pet. App. p. 20; 515 F. 2d 523).

2. The AEC disregarded its own past course of conduct in approving nuclear power sites as shown by the Staff Working Paper[10] and that if a construction permit were granted to Bailly, "Bailly would achieve the dubious distinction of being nestled within one of the top few most dense population areas of all 68 sites proposed thus far in the United States for siting nuclear power plants" (Pet. App. pp. 23-24; 515 F. 2d 525).

3. Nathaniel Reed, the Assistant Secretary of the Interior in testimony before the ASLB, stated that the Department was irrevocably against the Bailly site. (Pet. App. p. 25; 515 F. 2d 526). Furthermore, the

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10. AEC REGULATORY STAFF WORKING PAPER, POPULATION DISTRIBUTION AROUND NUCLEAR POWER PLANT SITES, Appendix A (April 17, 1973, released April 9, 1974).

DRAFT REGULATORY GUIDE 4.7, GENERAL SITE SUITABILITY CRITERIA FOR NUCLEAR POWER STATIONS (September, 1974) (hereinafter "Draft Regulatory Guide"), suggested that sites adjacent to lands devoted to public use may be considered unsuitable, in particular the use of some sites close to special areas administered by Federal agencies for scenic or recreational use may cause unacceptable impacts regardless of design parameters. Furthermore, the Draft Regulatory Guide suggested that the AEC should consult the concerned government agencies to determine the acceptability of sites near special areas of public use. Yet the AEC accepted the site despite the irrevocable opposition of the Department of Interior (Pet. App. p. 26; 515 F. 2d 527).

4. The fact that the AEC has been striving to standardize its approach to the licensing of nuclear power plants. The Staff Working Paper and the Draft Regulatory Guide are a part of this standardization process which the AEC anticipated would enhance reactor safety (Pet. App. pp. 28-29; 515 F. 2d 527-28):

a. the Staff Working Paper "recommends a minimum exclusion distance of .4 miles and a low population zone ("LPZ") of at least two (2) miles" (Pet. App. pp. 30-31; 515 F. 2d 528-29); and

b. the Draft Regulatory Guide recommends an LPZ of "3 miles to the outer boundary of the LPZ" (Pet. App. p. 31; 515 F. 2d 529). The LPZ for the Bailly plant was determined to be 1½ miles which include about 640 acres of Class IV land of outstanding natural area of special significance for the public (*Id*); the exclusion area was determined

by ASLB to be .1168 miles (LBP 74-19, p. 561). If the recommendations of both the Staff Working Paper and the Draft Regulatory Guide were followed, an exclusion area of 0.4 miles would extend into this special area of the National Lakeshore a distance of 1,312 feet (Pet. App. p. 31, n. 31; 515 F. 2d 529 n. 31). Since as many as 87,000 persons a day will visit both the Dunes National Lakeshore and the State Park, it must be presumed that a large number of people will be within the affected 640 acres at any particular time (Pet. App. p. 32; 515 F. 2d 529); and

5. That there has not been any program worked out to evacuate visitors from the Lakeshore (Pet. App. pp. 32-33; 515 F. 2d 530).

GROUNDS FOR DENYING WRIT OF CERTIORARI

I.

THE COURT'S DECISION DID NOT DEPART FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS.

NIPSCO and the Government argue that the AEC properly applied its regulations to the facts and that the decision below should be reversed. Both NIPSCO and the Government contend that the Court below erred in reversing the AEC by making a determination on questions of fact when it was obliged to defer to the expertise of the Commission. But the Court below did not make a determination on questions of fact, rather it determined that the AEC did not properly apply its regulation. NIPSCO's and the Government's contentions are without merit, and if allowed would grant unfettered discretion without judicial review to an agency.

This Court recognizes that "the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia." *American Ship Building Company* vs. *N.L.R.B.*, 380 U.S. 300, 318 (1965). Thus, an agency cannot use "expertise" as a magic wand which can be indiscriminately waved over its findings and insulate them from review (*See* L. Jaffee: Judicial Control of Administrative Action, Chapter 15, Page 613 (1965)). Although an agency's interpretation of its own regulations is subject to substantial deference, that deference does not constitute unreviewable discretion. *Hayes International Corp.* vs. *McLucas*, 509 F. 2d 247 (5th Cir. 1975) NIPSCO agrees that

the AEC's expertise was not, in fact, relevant to the application of the particular regulation.

There is no dispute between the parties regarding the legal standard for judicial review. This Court has outlined the duty of appellate courts under the Administrative Procedure Act (5 U.S.C. Section 706(2)(e)) to review the whole record. *See Universal Camera Corporation* vs. *N.L.R.B.*, 340 U.S. 474, 490-91 (1951). Great deference is owed to an agency's interpretation of its own regulation unless such interpretation is inconsistent with past interpretations. *Udall* vs. *Tallman*, 380 U.S. 11, 85 S. Ct. 792, 13 L. Ed. 2d 283 (1965). However, when decisions of an administrative commission do not comply with their own regulations, such decisions must be reversed by a reviewing court. *See General Protective Committee for Holders of Option Warrants of United Corp.* vs. *S.E.C.*, 346 U.S. 521 (1945) *reh. den.* 347 U.S. 911. The lower court deferred to the expertise of the AEC in determining the first two buffer zones (Pet. App. p. 11; 515 F. 2d 519) but stated that the third zone merely required a mathematical computation and interpretation of non-technical language of a regulation where no expertise beyond normal adjudication was required (Pet. App. p. 12; 515 F. 2d 519).

II.

THE LOWER COURT WAS CORRECT WHEN IT HELD THAT THE AEC DID NOT PROPERLY APPLY ITS OWN REGULATION.

NIPSCO and the Government argue that "the Commission has consistently interpreted its regulations to give controlling weight to the actual location of dense population and not to political boundaries." NIPSCO and the Government then cite three cases to support this contention (Pet. p. 17, n. 6). But the actual practice of the AEC is to the contrary. The AEC has almost uniformly interpreted the application of the siting regulation such that the term "boundary" referred to in 10 C.F.R. § 100.3(c) is the boundary of the nearest city with an actual or expected population of about 25,000.[11] For example, the ASLB in *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), RAI-73-7, 92, 96 (1973) stated:

> "The Plant is located at the southern end of Lake Norman and approximately 11 miles *from the city boundary of Charlotte, the closest population center.*" (Emphasis supplied)

In *Pacific Gas and Electric Co.* (Diablo Canyon Unit 2), 4 A.E.C. 447, 450 (1970) the ASLB said:

> "The radius of the low population zone is 6 miles and *the population center distance is 10 miles, which is the distance from the site to the nearest boundary of the City of San Luis Obispo.*" (Emphasis supplied)

The three decisions cited by NIPSCO as "consistent" with the AEC's interpretation do not support the view that the court's decision is in conflict with past decisions and that there has been a consistent agency interpretation of the regulations to ignore city boundaries.[12] To the contrary, the

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11. At the onset of NIPSCO's permit application process, both NIPSCO and the AEC staff assumed the word "boundary" to mean political boundary when referring to the population center distance (TR. 627) — an interpretation which is consistent with the interpretation given the same term in the same context by the court below.

12. *Southern California Edison*, ALAB-248, RAI-74-957 (1974) does not stand for the proposition that political boundaries are to be ignored. In this case the AEC con-

lower court's decision is consistent with the overwhelming number of agency applications which in fact, measure to political boundaries for determining the population center distance.

In addition to being consistent with—not contrary to—the vast majority of the AEC's own interpretations and applications, the Court's interpretation is the most sensible application. The use of an artificially constructed boundary around an otherwise undefined densely populated area is too vague and unworkable for reasonable application (Pet. App. pp. 14-15; 515 F. 2d 521).

The lower court concluded that "there is neither reason nor sound safety policy to cut down the boundaries of that unit [political or corporate limits of the 25,000 population unit] and make some hopeless attempt to construct imaginary boundaries". (Pet. App. pp. 14-15; 515 F. 2d 521) Such an attempt by the AEC to apply whimsically imagin-

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sidered the densely populated areas outside the city boundaries and closer to the reactor site. Similarly in *Consumer Power Co.* (Midland Plant Units 1 and 2), 5 A.E.C. 214, 218 (1972) the Licensing Board did not state that political boundaries are to be ignored but held that the population center distance could be reduced to less than 1⅓ times the low population zone to make the population center distance equal to the distance from the reactor to the city boundary (This reduction by the ASLB appears to be in contradiction to language of 10 C.F.R. § 100.11(a)(3) and to *Southern California Edison Co.* (San Onofre Station, (Units 2 and 3)), ALAB-268, NRCI 75/4, 383, 404 n.50, (1975) where the Board of Appeals stated that population center distance is "unalterable"). In *Consolidated Edison Co.*, 5 A.E.C. 43 the Board pointed out that the population center distance was not an issue and that there had been no serious dispute concerning the boundary. *Id,* at 45.

ary boundaries would increase the danger to life or property and would be contrary to the recent staff siting evaluations contained in the Regulatory Staff Working Paper and the Draft Regulatory Guide. Thus, the Court's decision gives full effect to the language and obvious purpose of the regulation. *NLRB* v. *Brown,* 380 U.S. 278, 291 (1965).

The court below considered the criteria used by the AEC to determine the location of the more densely populated portions of the population center. The Licensing Board had relied upon official Geological Survey (U.S.G.S.) maps upon which "densely populated areas" were supposedly depicted in pink. On these maps, individual dwellings were depicted as dots and the red or pink areas "indicate an area where all buildings cannot be shown in their true position because of *map scale*" (Memorandum, p. 8, n.10) (Emphasis supplied). Accordingly, the definition of the "pink areas" is not merely imprecise—it is meaningless. The "pink area" is a map maker's convenience to indicate where the scale of a particular map precludes details of individual structures. Naturally, if the scale were changed the area actually encompassed by the "pink area" would necessarily change, but not proportionately. For example, there might be large "pink areas" on a map where one inch equals one mile, but on a map using a scale of one inch equals 500 feet, there may be no "pink areas". Clearly, a matter as important as where nuclear power plants are to be sited near populated areas cannot be dependent upon the Licensing Board's unrestricted selection of a map with a particular scale and level of detail producing whatever "pink area" the Licensing Board might desire.[13] Accord-

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13. NIPSCO argues that the total population of the City of Portage within the two miles of the reactor is principally zoned industrial and has a total population of only 81 people

ingly, the court below was clearly correct when it said, "The map itself made no representations or even references to population .. ." and there were no indicated guidelines used by the cartographers in selecting the pink-tinted areas (Pet. App. pp. 15-16; 515 F. 2d 521).[14]

(Pet. p. 20). This statement is at best misleading. Also within two miles of the reactor are: a) the Bethlehem Steel Corporation's 7,500 employees located at or about one mile from the Bailly site; b) a large portion of the expected 87,000 visitors per day to the State Park and Lakeshore, which "could or would come within the two-mile limit" of the reactor (Pet. App. p. 16; 515 F. 2d 522); c) and the probable future increases in the working population of the industrial areas between the reactor and downtown Portage. In addition, the boundaries of each of the communities of Dunes Acres, Porter and Burns Harbor are all less than two miles from the plant. *Id.* Furthermore, there are residentially used and future residential growth areas within the two mile radius of the plant (H. Read, p. 13, 14 following TR. 7391). Certainly, the regulations are intended to protect people while at work and play as well as when they are asleep in their homes. The term "population" must be construed to include "shopping centers, manufacturing centers or other areas of population besides residences." (TR. 6427). Moreover, the ASLAB has said that the word "residents" in 10 C.F.R. Section 100.3(c) includes transients such as park visitors, at least insofar as a large number of persons are expected to utilize the beach and other park facilities. *Southern California Edison Co.* (San Onofre Station Units 2 and 3), ALAB, RAI-74-12, 937, 962 (1974).

14. At one point NIPSCO argued that centroids should be substituted for boundaries, but even the Licensing Board rejected the use of centroids. (*See,* Pet. App. p. 15, n.10; 515 F. 2d 521, n.10).

III.

A VIABLE ALTERNATE SITE IS AVAILABLE.

A viable alternate site, Schahfer, has been available since the Bailly proceedings began over three years ago. The Schahfer site is located on the Kankakee River approximately 32 miles southeast of the Bailly site. Presently there is a 500 megawatt, newly constructed coal-fired power generating facility in this site operated by NIPSCO. Since 1972, Schahfer has been under construction for providing transmission lines for the delivery of power throughout Northern Indiana. The Schahfer site has been approved for power plant capacity of 2,000 megawatts by the State of Indiana. There is approximately 4,200 acres owned outright by NIPSCO at the Schahfer site allowing more than adequate space for the three buffer zones with no sensitive environmental area nearby. Furthermore, the Licensing Board found the Schahfer site to be surrounded by a lower population density than Bailly and in respect to the potential risk to the population, the Schahfer site would be a *plus* (Pet. App. p. 146) (Emphasis supplied).

Since October 16, 1974, all construction of the Bailly site has effectively ben stopped. There is no reason to expect, as NIPSCO and the Government claim (Pet. p. 21, n.9) that if NIPSCO filed a new application with the Agency it would be granted. As the Court below brought out, there were many facts militating against the location of the nuclear plant at the Bailly site. Furthermore, in the AEC's cost-benefit balance under NEPA, the Licensing Board found one factor that tipped the scale overwhelmingly in favor of the Bailly site was the delay that would be associated with NIPSCO's shifting to the alternate site (Pet. App. p. 147). But, in view of the events occuring since that initial balance was made, in particular, the halting of all construction at the

site resulting from the stay order of the court below, the development of the Schahfer site by NIPSCO and the recent announcement by National Steel that it plans to build its new steel plant with self-electrical generating facilities within two-and-one-half miles of the Bailly site—thereby adding additional thousands of people to the proximity of the nuclear plant, the scale now is tipped overwhelmingly in favor of the alternate Schahfer site.

IV.

THE JUNE 24. 1975 AMENDMENT TO 10 C.F.R. PART 100 RAISES ISSUES NOT BEFORE THIS COURT.

The recent interpretative Amendment published by the NRC and the manner in which the regulation was amended raises issues not properly before this Court. For example, the NRC labeled its action as "interpretative" thereby allegedly falling within the exemption from the informal rule-making proceeding requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, but the NRC's action could be labeled substantive thereby requiring informal rule-making proceedings. The Court of Appeals in *Detroit Edison Company* v. *United States Environmental Protection Agency,* 496 F. 2d 244, 249 (6th Cir. 1974), relying upon *Columbia Broadcasting System, Inc.* v. *United States,* 316 U.S. 407, 416, stated, "The particular language placed upon [a regulation] is not necessarily conclusive for it is the substance of what the Commission has purported to do and has done which is decisive."

Second, even if relevant, the Amendment does not demonstrate that the Court erred as NIPSCO contends in its petition (Pet. p. 18). The Amendment simply states that

"political boundaries are not controlling in the application of this guide". But political boundaries are not specifically excluded. If political boundaries are not controlling should they totally be ignored? If ignored, what guidelines or standards should be used in their stead—meaningless "pink areas"? If political boundaries are not controlling, are they relevant? If so, under what circumstances, and to what extent? The court below made the determination that under the facts presented, that political boundaries were the only logical and sensible criteria to use in determining the population center distance. The Amendment is no less ambiguous than the old regulation considered by the lower court in that both regulations (10 C.F.R. § 100.11(a)(3) and as now amended) failed to give guidelines or standards to guide the NRC in their application. But the application and interpretation of the new regulation is not before this Court since neither NIPSCO or the Government have claimed that the new regulation is retroactively applicable to the Bailly plant.

Third, if the June 24, 1975 action by the NRC were interpretative, which Illinois contends it is not, another question is raised as to whether such an *ad hoc* interpretation of a regulation is an attempt to subvert the judicial process. Illinois contends that this Court should disregard and give no weight to such *ad hoc* action by the NRC. *See United States* v. *Leslie Salt,* 350 U.S. 383, 396 (1956).

NIPSCO, cites three cases to support its suggestion that, in view of the intervening legal development, (the June 24, 1975 Amendment) this court should "grant the Petition for Certiorari, summarily vacate the judgment below and re-

mand the cause for further consideration . . ." (Pet. p. 23). But none of the three cases[15] cited by NIPSCO were concerned with an agency, interpreting a regulation while that regulation was being contested in the courts in an action in which the agency was a party. The cases cited by NIPSCO are clearly distinguishable and are not persuasive to require the remand of this case to the lower court. Thus, for the reasons state the June 24, 1975 action by the NRC should be disregarded. *See, United States* v. *Finley Coal Co.*, 493 F. 2d 284, 291 (6th Cir. 1974).

CONCLUSION

For the reasons presented above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of Illinois,
RICHARD W. COSBY,
MARVIN N. BENN,
Assistant Attorneys General,
Environmental Control Division,
188 West Randolph, Suite 2315,
Chicago, Illinois 60601,
312/793-2491

Attorneys for Respondents.

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15. *Hunter* v. *Tennessee*, 403 U.S. 417; *Egan* v. *City of Aurora*, 365 U.S. 514; *Thorpe* v. *Housing Authority of the City of Durham*, 386 U.S. 670.